BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY A. BAILEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 248,868 & 248,869
HALLMARK CARDS, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the November 12, 2003 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 13, 2004.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the Wage Stipulation filed by the parties on October 7, 2002, and the Stipulation regarding payments to claimant's Rollover Individual Retirement Account filed by the parties on October 20, 2003.

ISSUES

In Docket No. 248,868, claimant alleges he sustained a series of mini-traumas while working for respondent during the period from January 1997 through October 29, 1999. In that claim, claimant requests workers compensation benefits for injuries to both wrists, elbows and shoulders.[1]

[1] Application for Hearing (filed Nov. 3, 1999).

In Docket No. 248,869, claimant alleges he temporarily aggravated his left shoulder on October 1, 1999,[2] while lifting a box of cards.

In the November 12, 2003 Award, Judge Avery granted claimant benefits for injuries to both shoulders and his left elbow. The Judge determined the appropriate date of accident for claimant's bilateral shoulder injuries was August 16, 1998, which was the last day that claimant would have worked before having the August 17, 1998 left shoulder surgery. For the bilateral shoulder injuries, the Judge awarded claimant permanent disability benefits for a six percent whole body functional impairment.

Regarding the left elbow, Judge Avery determined the appropriate accident date was January 29, 1998, which corresponds to the accident date the parties used at an August 18, 1999 settlement hearing in which claimant received monies for a right elbow injury.[3] In addition to the permanent partial general disability benefits the Judge awarded claimant for the bilateral shoulder injuries, the Judge awarded claimant permanent disability benefits for a scheduled injury to the left elbow based upon a two percent functional impairment to the left arm.[4]

In analyzing claimant's permanent partial general disability for the bilateral shoulder injuries under K.S.A. 1998 Supp. 44-510e, Judge Avery found claimant began earning wages on July 22, 2002, which were comparable to those he was earning before sustaining his shoulder injuries. The Judge also concluded respondent was entitled to a credit for retirement benefits and, consequently, the Judge found claimant's permanent partial general disability benefits should be limited to his whole body functional impairment rating, including that period between claimant's last day of working for respondent and the date that he began earning a comparable wage (February 9, 2000, to July 22, 2002). Accordingly, the Judge allowed respondent a credit for the payment of retirement benefits before those alleged retirement benefits were rolled over into claimant's Individual Retirement Account (IRA).

Claimant contends Judge Avery erred. Claimant argues, contrary to the Judge's findings: (1) he is entitled to receive a work disability (a permanent partial general disability greater than the functional impairment rating) as only some of his overtime earnings should be included in computing his post-injury wages, (2) respondent should not receive a retirement benefit credit for the monies respondent transferred to an IRA as the money

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[2] Claimant's Reply Brief at 6 (filed Feb. 26, 2004).

[3] P.H. Trans., Resp. Ex. A.

[4] The reference to the right elbow in the section of the Award that sets forth claimant's permanent disability benefits appears to be a typographical error.

neither represents a retirement benefit nor is the money being received as contemplated by K.S.A. 44-501(h), (3) he is entitled to receive compensation for the right elbow as he has sustained additional functional impairment as indicated by Dr. Craig L. Vosburgh's functional impairment ratings, (4) he has sustained a greater whole body functional impairment than that found by the Judge, (5) his past and ongoing medications should be paid as authorized medical benefits, (6) any testimony concerning the videotape that Dr. Vosburgh viewed should be excluded from the record as respondent failed to provide claimant with the videotape despite a request for production, and (7) Dr. Sergio Delgado's testimony should be excluded from the record as the doctor refused to answer certain questions and also refused to provide a list of attorneys he had previously provided in a federal court proceeding.

Accordingly, claimant requests the Board to modify the November 12, 2003 Award and grant him benefits for a work disability.

Respondent also contends Judge Avery erred. Respondent argues: (1) claimant failed to prove he injured his shoulders working for respondent, (2) the appropriate date of accident for the alleged bilateral shoulder injuries should be either January 23, 1998, or April 27, 1998, (rather than August 16, 1998) as those two dates accurately reflect the dates claimant stopped performing his regular work activities that allegedly caused his injuries, (3) claimant failed to provide timely written claim for either a January or April 1998 accidental injury, (4) the Judge erred by rejecting respondent's request to withdraw its stipulation admitting timely written claim, and (5) a post-injury wage should be imputed to claimant for the period following his separation from respondent and his commencing work with his new employer, Digital Simplistics, Inc.

Consequently, respondent requests the Board to deny claimant's request for benefits in the first docketed claim as he failed to prove timely written claim. In the alternative, respondent requests the Board to grant its request to withdraw the stipulation that claimant provided timely written claim and to remand this proceeding to the Judge for the parties to present additional evidence on the written claim issue. Should the Board award claimant any permanent partial disability benefits, respondent requests the award either be limited to a two percent functional impairment to the arm for the left elbow injury or, at most, affirm the November 12, 2003 Award.

The parties present the following issues to the Board on this appeal:

1. Did claimant injure his shoulders while working for respondent?

2. What is the appropriate date or dates of accident for claimant's bilateral upper extremity injuries?

3. Should respondent be permitted to withdraw its stipulation that claimant provided respondent with timely written claim? If so, does the record establish claimant provided respondent with timely written claim? If not, should the Board remand this proceeding to the Judge for taking additional evidence on that issue?

4. What is the nature and extent of claimant's functional impairment?

5. What is claimant's post-injury wage for purposes of determining his permanent partial general disability?

6. What is the nature and extent of claimant's disability?

7. Is respondent entitled to receive a credit under K.S.A. 44-501(h) for the payment of retirement benefits?

8. Is claimant entitled to receive the medications prescribed by his personal physician as authorized medical benefits?

9. Should testimony be excluded from the record concerning a videotape that was provided to Dr. Vosburgh but not produced for claimant's review?

10. Should Dr. Delgado's testimony be excluded from the record because the doctor refused to answer certain questions and also refused to provide a list of attorneys that he had previously provided in federal court?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

Docket No. 248,868

The facts are not complex. But applying those facts to the Workers Compensation Act, K.S.A. 44-501 *et seq.*, is somewhat complicated.

Claimant commenced working for respondent in 1989. While operating various machines claimant began developing symptoms in his elbows, wrists and shoulders. In approximately 1995, claimant began operating a machine on the glue line, which seemingly aggravated his elbows and shoulders as he began experiencing burning sensations in those parts of his body. In January 1997, claimant reported his shoulder problems to respondent, who referred him to a doctor. For personal reasons that are not explained, claimant did not see that doctor.

Claimant continued to perform his regular duties on the glue line and in January 1998 returned to respondent's nursing department to report his upper extremity symptoms. Respondent sent claimant to Dr. Craig L. Vosburgh, who saw claimant on January 23, 1998. At that appointment, claimant reported symptoms in both wrists, elbows and shoulders. The doctor restricted claimant's work and began treatment. The doctor initially diagnosed lateral epicondylitis and focused treatment on the right elbow. But by March 1998 the doctor's diagnoses included bilateral rotator cuff tendonitis.

Dr. Vosburgh permitted claimant to return to his regular work duties on the glue line as of April 6, 1998. When claimant saw the doctor again in late April 1998, claimant reported he tolerated the first week back to his regular work but afterwards his upper extremity symptoms recurred. In his office records, the doctor noted claimant's work had aggravated his shoulders. Dr. Vosburgh again restricted claimant's work activities and sent him to physical therapy. When claimant's left shoulder symptoms did not resolve, the doctor recommended left shoulder surgery.

After Dr. Vosburgh recommended left shoulder surgery, respondent denied claimant's shoulder problems were related to his work. Despite that denial, on August 17, 1998, claimant underwent left shoulder surgery. During surgery, the doctor found fraying of the rotator cuff, which is objective evidence that the shoulder was aggravated by work. Approximately three months after the left shoulder surgery, on November 23, 1998, Dr. Vosburgh operated on claimant's right shoulder.

After the two shoulder surgeries, Dr. Vosburgh's focus shifted to treating claimant's right elbow. On February 12, 1999, the doctor performed right elbow surgery.

After recuperating from the bilateral shoulder surgeries and the right elbow surgery, Dr. Vosburgh released claimant to return to his regular job duties as of May 19, 1999. In May 1999, claimant returned to work for respondent performing his regular job duties on the glue line. According to claimant, his bilateral shoulder and elbow symptoms then recurred to the level they were before his surgeries.

Meanwhile, in June 1999, Dr. Vosburgh rated claimant as having a six percent functional impairment to the right upper extremity which converted to a four percent whole body functional impairment. The doctor's June 22, 1999 letter to Shirley Miles of Royal & Sunalliance read, in part:

> I am responding to your letter dated June 7, 1999. As you noted, Mr. Gary Bailey was discharged from my care on 4-29-99. He was initially seen in January, 1998 for lateral epicondylitis of the right elbow. He eventually underwent tennis elbow release on February 12, 1999. His postoperative case was uncomplicated until eventual discharge for medical care.

> Using the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition as a reference, Mr. Baily *[sic]* appears to have a 6 percent permanent impairment of the right upper extremity or 4 percent whole person impairment.[5]

Based upon the doctor's functional impairment rating, respondent offered to pay claimant permanent disability benefits to settle any claim he might have for the right elbow injury. On August 18, 1999, the parties appeared before a special administrative law judge, who approved the proposed settlement. In exchange for receiving $5,610.80, claimant agreed to give up his rights under the Workers Compensation Act to request future medical treatment, review and modification and his right to have a judge determine his benefits.

At the settlement hearing, neither the Judge, respondent's attorney, nor claimant specified what injury or injuries were being settled. The settlement hearing transcript, however, does reflect claimant was receiving benefits for a January 29, 1998 accident. Moreover, Dr. Vosburgh's June 22, 1999 letter to Shirley Miles, quoted above, was presented to the Judge for consideration. As quoted above, that letter referred only to the right elbow. There was no mention of claimant's shoulder injuries. Claimant appeared pro se at the settlement hearing.

Returning to his regular job duties on the glue line aggravated claimant's bilateral upper extremity symptoms. Despite those worsening symptoms, claimant continued to perform his regular job duties on the glue line until October 1, 1999, when he strained his left shoulder.

After straining his left shoulder, in early October 1999 claimant returned to Dr. Vosburgh, who again restricted his work activities. When claimant saw the doctor on October 28, 1999, claimant related his right elbow pain was as bad as it ever was and that he was having similar symptoms in the left elbow but less severe. The doctor sent claimant to a functional capacity evaluation and later permanently restricted claimant from repetitively grasping or lifting with either arm and lifting more than 15 pounds.

On November 18, 1999, Dr. Vosburgh provided another functional impairment opinion. The doctor, allegedly using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.), this time rated claimant as having a five percent functional impairment to the right upper extremity and a five percent functional impairment to the left upper extremity, which combine for a six percent whole body functional impairment. According to the doctor, those ratings address the claimant's injuries to both elbows and both shoulders.

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[5] Vosburgh Depo., Ex. 5.

October 1, 1999, was the last date that claimant performed his regular work duties on the glue line. Nonetheless, respondent accommodated claimant's injuries until February 9, 2000, when respondent advised claimant he was being taken off work and being placed on disability.

In April 2000, claimant returned to Dr. Vosburgh with left shoulder complaints, requesting a referral to a shoulder specialist. But the doctor declined claimant's request. In February 2001, claimant again returned to the doctor seeking additional treatment. And in March 2001, the doctor operated on claimant's left elbow. Despite that surgery, the doctor did not believe his November 1999 functional impairment ratings were affected.

At Judge Avery's request, in September 2000 board-certified orthopedic surgeon Dr. Edward J. Prostic examined claimant. As a result of that evaluation, the doctor concluded claimant had sustained repeated minor trauma to both upper extremities that comprised a 20 percent functional impairment to each upper extremity for a 23 percent whole body functional impairment[6] under the AMA *Guides*.

After being placed on disability on February 9, 2000, claimant did not look for other employment. Instead, in November 2000, claimant began classes at DeVry Institute. In June 2002, claimant graduated and on July 22, 2002, began working for Digital Simplistics, Inc., as a field service technician servicing computers. When claimant testified at the June 2003 regular hearing, he was earning $12 per hour straight time, and earning time and a half for overtime but receiving no fringe benefits.

On July 27, 2002, respondent terminated claimant's fringe benefits. The parties stipulated claimant's pre-injury average weekly wage was $580.29 before July 27, 2002, and $743.46 commencing that date.

Judge Avery appointed board-certified orthopedic surgeon Dr. Sergio Delgado to examine and evaluate claimant for this claim. The doctor saw claimant in December 2002 and diagnosed bilateral shoulder impingement and bilateral epicondylitis. Utilizing the AMA *Guides* (4th ed.), the doctor rated claimant as having a five percent functional impairment for each shoulder and a five percent functional impairment for each elbow, which combined for a 12 percent whole body functional impairment.

At his attorney's request, claimant saw Dr. Prostic again in February 2003. The doctor noted claimant had a good response to the bilateral subacromial decompression shoulder surgeries and that claimant was improved by bilateral tennis elbow releases. The doctor also noted residual findings compatible with mild radial tunnel syndrome on the

[6] Prostic Depo., Ex. 2.

right, findings compatible with bilateral carpal tunnel syndrome and bilateral thoracic outlet syndrome. The February 2003 examination did not change the doctor's earlier opinion that claimant had sustained a 23 percent whole body functional impairment. But the doctor did modify his ratings somewhat as he testified claimant had a 23 percent functional impairment to the right upper extremity and a 19 percent functional impairment to the left upper extremity.[7] Dr. Prostic's final diagnosis was bilateral rotator cuff disease, bilateral mild carpal tunnel syndrome, bilateral mild thoracic outlet syndrome, and right radial tunnel syndrome.

After claimant was officially discharged from respondent's employment, in August 2002 respondent's profit sharing plan paid claimant's rollover IRA $39,919.99 followed by an October 2002 payment from respondent's Retirement Trust of $6,942.90. The parties stipulated claimant has made no withdrawals from the IRA and that he has not personally received any monies from the profit sharing plan or the Retirement Trust.

1. Did claimant injure his shoulders while working for respondent?

The Board finds that claimant injured both shoulders while working for respondent. Before commencing work for respondent, claimant had no upper extremity problems. Claimant attributes his bilateral shoulder injuries to the estimated 1,500 to 3,000 times per shift he would reach to chest or shoulder height to load his machines on the glue line, which he did for approximately four years.

As indicated above, Dr. Prostic saw claimant at the Judge's request in September 2000. As a result of that evaluation, Dr. Prostic concluded claimant had sustained repeated minor trauma to both upper extremities during the course of his work for respondent. Furthermore, Dr. Delgado, who also saw claimant at the Judge's request, believed repetitive, heavy work caused claimant's injuries. And even Dr. Vosburgh testified claimant's forearm and elbow problems were related to the repetitive grasping, pinching and lifting at work, but it was difficult to attribute all of claimant's shoulder problems to his work. That testimony implies that he was attributing at least some of claimant's shoulder problems to work.

Claimant's testimony regarding the nature of his work, coupled with the medical evidence, support the conclusion that claimant injured both upper extremities, including both shoulders, due to the work he performed for respondent.

[7] Prostic Depo. at 6.

2. What is the appropriate date or dates of accident for claimant's bilateral upper extremity injuries?

One of respondent's arguments is that claimant sustained two separate repetitive use injuries. Respondent contends the first repetitive use injury ended in either January or April 1998 as claimant performed his regular job duties before reporting his symptoms to the company nurse in January 1998 but later returned to his regular job duties during April 1998. Consequently, respondent requests the Board to parcel claimant's upper extremity injuries into different accidents and determine claimant's permanent disability benefits for each of those accidents. Therefore, date of accident is a principal issue in this proceeding.

Following creation of the bright line rule in the 1994 *Berry*[8] decision, Kansas appellate courts have consistently grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[9] which is one of the most recent decisions on point, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[10]

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[11]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held the appropriate date of accident for a

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[8] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[9] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[10] *Id.* at Syl. ¶ 3.

[11] *Id.* at Syl. ¶ 4.

repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The *Lott-Edwards*[12] decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day-worked rule is applicable if the work performed in an accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

Further, the Kansas Supreme Court in *Depew*[13] held that when both upper extremities are simultaneously injured, the injury is compensable under K.S.A. 44-510e rather than as two scheduled injuries under K.S.A. 44-510d. In *Depew*, the worker's right upper extremity symptoms began before Thanksgiving 1990, the worker underwent right wrist and elbow surgery in April 1991, the worker returned to work in May 1991, the worker began reporting left upper extremity symptoms in September 1991, the surgeon then issued work restrictions, and the worker subsequently left work in December 1991 due to the work injuries. Although the worker's upper extremity symptoms began at quite different times, the Kansas Supreme Court found the worker simultaneously injured her upper extremities. Accordingly, *Depew* stands for the proposition that repetitive use injuries should be compensated as injuries to the body rather than as separate, multiple scheduled injuries.

Considering the *Treaster*, *Lott-Edwards*, and *Depew* decisions, the Board concludes the appropriate date of accident for claimant's repetitive trauma accident is the last day that he performed his regular job duties on the glue line, October 1, 1999, as after that date claimant moved to an accommodated job, which was an attenuating event. The Board also finds claimant has sustained one accident with resulting injuries to both shoulders and both elbows. Therefore, the appropriate date of accident for the elbow injuries is the same as the shoulders and claimant is only entitled to receive one award of benefits for all of these injuries.

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[12] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[13] *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

3. What is the extent of claimant's functional impairment?

Considering the medical opinions and functional impairment opinions of Drs. Vosburgh, Prostic and Delgado, the Board concludes claimant has sustained a 15 percent whole body functional impairment due to the injuries he sustained to both upper extremities. In arriving at that percentage, the Board has considered the six percent, 12 percent and 23 percent whole body functional impairment opinions provided by Drs. Vosburgh, Delgado and Prostic, respectively.

4. What is the extent of claimant's permanent partial general disability?

As a result of his bilateral upper extremity injuries, claimant lost his job with respondent. Claimant did not seek alternative employment but, instead, sought retraining with DeVry Institute. Due to the training program, in July 2002 claimant obtained employment servicing computers.

Because claimant has sustained injuries to both upper extremities, his permanent partial general disability benefits are defined by K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the **opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[14] and *Copeland*.[15] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted

[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[16]

And the Kansas Court of Appeals in *Watson*[17] held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[18]

Claimant did not look for work after he was placed on disability in February 2000. Claimant testified it was not practical to look for work at that time but he does not further explain. Claimant, however, began his computer training at DeVry Institute in November 2000, which the Board finds reasonable as the vocational evidence indicates it was unlikely that claimant could be placed in a comparable wage job without additional training.

Post-injury wages

The Board concludes claimant failed to prove he made a good faith effort to find work during the period from February 10, 2000, to November 1, 2000. Accordingly, the Board will impute the federal minimum wage of $5.15 per hour, or $206 per week, for purposes of determining claimant's permanent partial general disability for that period. The Board, however, will not impute a post-injury wage for the period that claimant completed

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[16] *Id.* at 320.

[17] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[18] *Id.* at Syl. ¶ 4.

his training program. Accordingly, for the period from November 1, 2000, through June 2002, claimant has a 100 percent wage loss for purposes of the wage loss prong of the permanent partial general disability formula.

On July 22, 2002, claimant began working for Digital Simplistics, Inc., earning $12 per hour. Furthermore, for the period from July 22, 2002, through June 15, 2003, claimant earned a total of $11,854.88 in overtime, or an average of $252.23 per week. Accordingly, for the period commencing July 22, 2002, the Board finds claimant's post-injury average weekly wage is $732.23, which comprises $480 ($12 per hour x 40 hours per week) straight time and $252.23 overtime.

For purposes of computing his post-injury average weekly wage for the permanent partial general disability formula, claimant argues only some of his post-injury overtime should be considered. Claimant argues the Board should not consider the actual overtime hours he has worked since beginning work for Digital Simplistics, Inc. Instead, claimant argues his post-injury overtime hours should be limited to the number of overtime hours that were used in computing his pre-injury average weekly wage. The Board disagrees.

Contrary to claimant's argument, the test for determining whether a worker is entitled to receive a work disability is not whether claimant is earning a wage that is comparable to that which he was earning before the accident. Instead, the test set forth in K.S.A. 1999 Supp. 44-510e is whether a worker is earning 90 percent or more of the pre-injury average weekly wage. And, according to that statute, when a worker works following the accident and earns at least 90 percent of the pre-injury wage, the worker is precluded from receiving a work disability.

For workers earning post-injury overtime, strictly applying K.S.A. 44-511 (Furse 1993) to compute the post-injury average weekly wage could result in a different post-injury average weekly wage each and every week the worker continued to work as the average overtime amount could constantly change. The legislature did not intend for an award to be modified each and every week due to changes in the average overtime pay. Rather, the legislature intended, for purposes of the permanent partial general disability formula, that the amount used as a worker's post-injury wage fairly and reasonably represent the worker's actual post-injury earnings. Accordingly, to reasonably gauge claimant's actual post-injury wages, the Board has averaged his total overtime earnings by the 47 weeks they represent. Should there be a significant change in claimant's overtime pay, the parties may request review and modification.

Task loss

The record contains several task loss opinions. Those opinions are based on lists prepared by claimant's vocational expert, Bud Langston, and respondent's expert, Michael

J. Dreiling, of the work tasks claimant performed in the 15 years before sustaining the injuries to his elbows and shoulders.

Dr. Prostic, who concluded claimant should be restricted from frequent forceful gripping with either arm, forceful twisting of either forearm and using the hands at or above shoulder height, reviewed a list of 30 former work tasks prepared by Mr. Langston and indicated claimant was unable to perform 23 of the 30 former work tasks, or approximately 77 percent.

At the other extreme, Dr. Delgado, who did not believe claimant needed any medical restrictions, determined claimant had lost the ability to perform two of the 18 former work tasks, or 11 percent, identified by Mr. Dreiling and three of the 30 work tasks, or 10 percent, identified by Mr. Langston.

Finally, Dr. Vosburgh reviewed Mr. Dreiling's task list and determined claimant had lost the ability to perform seven of the 18 former work tasks, or 39 percent. And after reviewing Mr. Langston's task list, Dr. Vosburgh indicated claimant had lost the ability to perform 19 of the 30 tasks, or 63 percent.

The Board is not persuaded that any of the task loss opinions is more persuasive than the others. Accordingly, the Board averages all five opinions and finds claimant has lost the ability to perform approximately 40 percent of the work tasks that he performed in the 15 years leading up to his bilateral elbow and shoulder injuries.

Permanent partial general disability

For the period through February 9, 2000, claimant continued to work for respondent in an accommodated position. No evidence has been presented to establish that claimant was not making at least 90 percent of his pre-injury wage. Accordingly, through that period of time claimant is entitled to receive permanent disability benefits based upon his 15 percent whole body functional impairment rating.

For the period from February 10, 2000, to November 1, 2000, claimant did not look for work and, therefore, a post-injury wage of $206 per week is imputed. Comparing $206 per week to the pre-injury wage of $580.29 (the stipulated pre-injury wage excluding fringe benefits) yields a 65 percent wage loss. Averaging the 65 percent wage loss with the 40 percent task loss creates a 53 percent work disability for the period from February 10, 2000, to November 1, 2000.

From November 1, 2000, through June 2002, claimant attended school, which was reasonable in these circumstances. After completing training, on July 22, 2002, claimant found employment using his newly acquired training and education. Accordingly, from

November 1, 2000, through July 21, 2002, claimant had a 100 percent wage loss, which, when averaged with the 40 percent task loss, produces a 70 percent work disability.

However, commencing July 22, 2002, claimant began earning approximately $732.23 per week, which is greater than 90 percent of his pre-injury average weekly wage (with and without fringe benefits). Consequently, as of July 22, 2002, claimant was no longer eligible to receive a permanent partial general disability greater than his 15 percent whole body functional impairment rating.

5. Should respondent be permitted to withdraw its stipulation that claimant provided timely written claim?

At the regular hearing, respondent initially stipulated claimant had provided it with timely written claim for workers compensation benefits. During the regular hearing, however, respondent requested to withdraw that stipulation as it wanted to pursue the theory that claimant sustained two periods of repetitive trauma and, thus, two separate repetitive trauma accidents. Consequently, under respondent's theory claimant failed to provide written claim for the first repetitive trauma accident, which it argued should be found to have occurred in either January or April 1998.

Above, the Board found that the appropriate date of accident for claimant's repetitive trauma injuries was October 1, 1999, which was his last day of performing his regular work duties before being moved to an accommodated position. Consequently, the issue of whether claimant provided respondent with written claim for a January or April 1998 injury is moot.

The Board denies respondent's request to withdraw its stipulation that claimant provided timely written claim. Furthermore, the Board denies respondent's request to remand this proceeding to the Judge for taking additional evidence on that issue.

6. Is respondent entitled to receive a credit under K.S.A. 1999 Supp. 44-501(h) for the payment of retirement benefits?

The Workers Compensation Act provides that an employee's workers compensation disability benefits may be reduced by retirement benefits being received by the worker. The Act provides, in part:

> If the employee **is receiving** retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent

> amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, **but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.**[19] (Emphasis added.)

As indicated above, in August 2002 respondent paid claimant's rollover IRA $39,919.99 and in October 2002 respondent paid claimant's rollover IRA $6,942.90. Claimant has not personally received any monies from either of those payments.

The Board concludes respondent is not entitled to a credit for the payment of retirement benefits. First, without addressing the issue of whether the payments made to claimant's rollover IRA should be deemed retirement benefits or not, claimant is not receiving those payments as that term is contemplated in the Act. Second, both payments were made after July 22, 2002, when claimant's permanent partial general disability was reduced to his functional impairment rating. Accordingly, the payments to claimant's IRA could not offset or reduce the workers compensation benefits that accrued before that date. Furthermore, the payment to the IRA could not reduce the benefits payable for a functional impairment after July 22, 2002, as "in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment."

7. Is claimant entitled to receive the medications presently being prescribed by his personal physician as authorized medical benefits?

Claimant is requesting additional medical care on the basis that he is receiving prescription medications from his personal physician. Accordingly, claimant desires reimbursement for the medications he has previously purchased, reimbursement for the miles driven to pick up those medicines and the payment of future prescription expense and mileage. Claimant testified his personal doctor is providing him prescriptions for a pain killer, muscle relaxer and a sleep aid.

Claimant argues the prescriptions are reasonable and medically necessary as a doctor is writing the prescriptions. The record contains very little evidence regarding this issue. However, Dr. Delgado testified claimant did not need any prescription medications as he should take mild over-the-counter analgesics.[20] And in Dr. Prostic's February 3,

[19] K.S.A. 1999 Supp. 44-501(h).

[20] Delgado Depo. at 23.

2003 medical report to claimant's attorney, the doctor indicated no additional treatment was recommended at that time.[21]

The Board finds claimant has failed to prove that his prescription medications are reasonable and necessary. Accordingly, the Board denies claimant's requests for reimbursement and for ongoing prescription medications as authorized medical care.

8. Should testimony be excluded from the record concerning a videotape that was provided to Dr. Vosburgh but not produced for claimant's review?

On November 1, 1999, claimant's attorney wrote Royal Insurance Company enclosing a copy of the application for hearing that had been filed with the Division of Workers Compensation. The letter advised the insurance carrier that Mr. Bryan's office was representing claimant in this proceeding. The letter also requested a copy of a videotape of claimant performing his job and provided, in part:

> In addition, it's my understanding a video tape *[sic]* was made of Gary doing his job, which was provided to Dr. Vosburgh for review, and for writing a report. Please provide us with a copy of the video tape *[sic]* that was provided to Dr. Vosburgh.

On November 22, 1999, claimant filed with the Division of Workers Compensation a Motion to Produce. That motion requested production of a number of items, including "[a]ll photos, or video tape *[sic]* or film of claimant." An Order for Compensation/Medical Records/Personnel Records dated March 1, 2000, was filed by the parties, but it did not mention the requested videotape.

When Dr. Vosburgh testified concerning viewing a videotape of claimant's alleged job duties, claimant objected on the grounds that he had requested the videotape but it had not been produced. Accordingly, claimant requests that all testimony concerning the videotape be excluded from the record.

Claimant had initially requested a copy of the videotape but later executed an Order for Compensation/Medical Records/Personnel Records without addressing the videotape. Furthermore, the record fails to establish claimant repeated his request for the videotape after the March 1, 2000 Order was entered. Likewise, the record fails to establish claimant requested subpoenas to obtain the videotape or requested any hearings before the Judge to address the videotape. Under these circumstances, claimant's request for excluding testimony concerning the videotape is denied.

[21] Prostic Depo., Ex. 3.

Nevertheless, the testimony concerning the videotape and any medical opinions formed after viewing the videotape have little weight as the record fails to establish what job duties the videotape displayed. Accordingly, it is unknown if the videotape showed claimant's regular job duties on the glue line or an accommodated job he had been given.

9. Should Dr. Delgado's testimony be excluded from the record because the doctor refused to answer certain questions and also refused to provide a list of attorneys that he had previously provided in federal court?

During Dr. Delgado's deposition, claimant asked the doctor to produce a document of attorneys that had hired the doctor for an evaluation. The doctor refused to produce the document and refused to divulge the information contained in the document. Consequently, claimant now requests that all of Dr. Delgado's testimony be excluded from the record.

Rather than pursuing the document by subpoena, order for production or any other remedy, claimant permitted the claim to be submitted to the Judge for decision. The Board concludes claimant failed to exhaust his remedies and, therefore, Dr. Delgado's testimony should not be excluded from the record.

Docket No. 248,869

Claimant initiated this claim as a result of the left shoulder strain he sustained on October 1, 1999, while working for respondent. At the time of the incident, claimant was lifting a box of cards. Claimant immediately reported the incident and was referred to Dr. Vosburgh for medical treatment.

The Board finds claimant did sustain personal injury by accident arising out of and in the course of his employment with respondent on that date. Nevertheless, the Board finds the record fails to establish that claimant sustained anything more than a temporary exacerbation of his symptoms. Accordingly, claimant is entitled to an award for the authorized medical treatment that he received and to an award for unauthorized medical benefits when, and if, such benefits are utilized. Claimant, however, is not entitled to receive an award for permanent disability benefits for that incident.

AWARD

WHEREFORE, the Board modifies the November 12, 2003 Award and in Docket No. 248,868, for a repetitive trauma injury resulting in permanent injury and impairment to both upper extremities having a date of accident for purposes of computing the award of October 1, 1999, grants claimant a 15 percent permanent partial general disability through

February 9, 2000; a 53 percent permanent partial general disability from February 10, 2000, to November 1, 2000; a 70 percent permanent partial general disability from November 1, 2000, through July 21, 2002; and a 15 percent permanent partial general disability commencing July 22, 2002.

Gary A. Bailey is granted compensation from Hallmark Cards, Inc., for an October 1, 1999 accident and resulting disability. Based upon an average weekly wage of $580.29, Mr. Bailey is entitled to receive the following disability benefits:

For the period from October 1, 1999, to February 9, 2000, Mr. Bailey is entitled to receive 18.71 weeks of permanent partial general disability benefits at $383 per week, or $7,165.93, for a 15 percent whole body functional impairment.

For the period ending October 31, 2000, Mr. Bailey is entitled to receive 34.86 weeks of temporary total disability benefits at $383 per week, or $13,351.38, and three weeks of permanent partial general disability benefits at $383 per week, or $1,149, for a 53 percent work disability.[22]

For the period from November 1, 2000, through July 21, 2002, Mr. Bailey is entitled to receive 89.71 weeks of permanent partial general disability benefits at $383 per week, or $34,358.93, for a 70 percent work disability.

For the period commencing July 22, 2002, Mr. Bailey's permanent partial general disability decreases from 70 percent to 15 percent. But due to the accelerated payout formula in K.S.A. 1999 Supp. 44-510e, no additional permanent partial general disability benefits are payable.

The total award is $56,025.24, which is all due and owing less any amounts previously paid.

And in Docket No. 248,869, claimant is entitled to an award for the authorized medical treatment that he received and to an award for unauthorized medical benefits when, and if, such benefits are utilized.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

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[22] The Board concludes claimant's permanent partial general disability benefits should not be reduced under K.S.A. 44-510a (Furse 1993) as the $5,610.80 paid to claimant at the parties' August 18, 1999 settlement hearing represents 16.6 weeks of permanent partial general disability benefits for a January 29, 1998 accident. Accordingly, there are no overlapping weeks of permanent partial general disability benefits for purposes of the K.S.A. 44-510a (Furse 1993) credit.

IT IS SO ORDERED.

Dated this ____ day of May 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director